

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1341

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

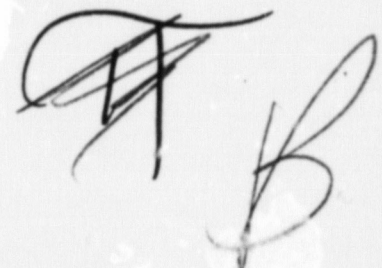
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

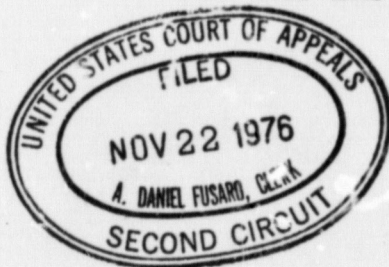
MARIO DeLUCIA and
ANGELO GERBASIO,

Defendants-Appellants.


Docket No. 76-1341

APPENDIX TO THE BRIEF
FOR APPELLANT DeLUCIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MARIO DeLUCIA

FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

107
District Office

Disp./Sentence

DELUCIA, MARIO JOSEPH

1
defendant

No. 2
of
Defendants

DOOLING, J.

U.S. CODE SECTION
18-659, 371 & 2

Did conspire to embezzle, and
unlawfully take from JFK Airport
goods moving in i.c.c.

2

MAGR. CASE NO. 75 M1843

DATE OF RELEASE
☐ Personal Recog
Denied ☐ Unsecured Bond
AMT ☐ Conditional Release
Set (000) ☐ 10% Depo
\$ 5 ☐ Surety
10/23/75 ☐ Collateral
date ☐ Bail Not
Made ☐ 3rd Party
☐ Bail Status ☐ Custody
Changed ☐ PSA
(See Docket)

CLOSED

U.S. Attorney or Asst.

Levin-Epstein

Aaron Schacher
32 Court St., Bklyn, NY.
UL 5-1003

ARREST

INDICTMENT

ARRAIGNMENT

TRIAL

U.S. Custody
Began on Above
Charges

☐ High Risk
Defn. &
Date Design'd

Information ☐
12-18-75
☐ Waived
☐ Superseding
☐ Indict/Info

1-8-76
1st Fyga
Final Plea

Trial Set For
4-5-76
☒ Not Guilty
☐ Nolo
☐ Guilty
☐ Not Guilty
☐ Nolo
☐ Guilty

Voir Dire
5/5/76
Trial Begin
5/5/76
Trial Ended
5/18/76

Disposition
☒ Convicted ☐ On All Counts
☐ Acquitted ☐ On Lesser Offense
☐ Dismissed ☐ WOP
☐ Nolle/Discontinued

☐ Prosecution Deferred

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING	Date Scheduled 11/21/75	<input type="checkbox"/> Dismissed <input type="checkbox"/> Exonerated
Summons	Issued			<input checked="" type="checkbox"/> Waived <input type="checkbox"/> Intervening Indictment	Date Held	<input checked="" type="checkbox"/> Held for District CJ <input type="checkbox"/> To Transfer District
	Served					<input type="checkbox"/> Held to Answer to U. S. District Court
Arrest Warrant				<input type="checkbox"/> Not Waived		AT: EDNY
COMPLAINT		10/23/75	VAC/070A	Tape No.	INITIAL/No.	Magistrate's Initials VAC/070A
OFFENSE (In Complaint)	Possession of goods stolen from foreign shipment. T-18 USC Section 659.					

Show last names and suffix numbers of other defendants on same indictment/information

GERBASIO

V. Excludable Delay

(a) (b) (c)

DATE	PROCEEDINGS
10/23/75	Arraignment - AUSA - I. Levin-Epstein, D.C. will get own.
11-18-75	Hearing waived on both defts. by D.C. telephonically - letter to follow.
11-19-75	Letter of confirmation recd. on waiver of hearing from D.C. D.C. Michael Washor, Esq. 16 Court St., B'klyn NY TR 5-1292
12-18-75	Before JUDD, J - Indictment filed.
1-8-76	Notice of Appearance filed.
1-8-76	Before JUDD, J - case called - deft & atty present - deft arraigned and enters a plea of not guilty - bail conditions contd - adjd to 4-5-76 for trial.
1-29-76	Notice of motion filed, ret. 2-13-76, for Bill of Particulars, Discovery etc.
2-3-76	Notice of Motion filed for Bill of Particulars, discovery and Inspection, etc. (forwarded to Chambers)
2/13/76	Before JUDD, J. - Case called - Adjd to 2/20/76
2-18-76	Affidavit of Aaron R. Schacher filed.
2-20-76	Before JUDD, J - case called - counsel Aaron Schacher present - defts motion for discovery and inspection argued - motion denied in part and granted in part as indicated on the record; case adjd to 4-5-76 for status report.
2/24/76	Notice of readiness for trial filed

BEST COPY AVAILABLE

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(n) - "SPEEDY TRIAL ACT".

IV. PROCEEDINGS (continued)

V. EXCLUDABLE DELAY

(a) (b) (c) (d)

4-5-76	Before JUDD, J - case called - deft & counsel present - deft waives 6 month rule (speedy trial) case adjd to May 5, 1976 for trial on consent of both sides.				
1/5/76	Before DOOLING, J. - Case called - deft and counsel present - trial ordered and begun - jurors selected and sworn - hearing ordered and begun on motion to suppress hearing contd to 5/6/76 at 9:30 A.M.				
5/6/76	Before DOOLING, J. - Case called - deft and counsel present - hearing suppression resumed - hearing concluded - motion to suppress denied and granted as indicated trial contd to 5/7/76				
5/5/76	Govt's request to charge filed:				
5/7/76	Before DOOLING, J. - Case called - deft and counsel present - trial resumed - trial contd to 5/10/76				
5-11-76	Defts' request to charge filed.				
5-11-76	Before DOOLING J - case called - deft & counsel present - trial resumed - Jury deliberations resumed - jury returned and rendered a verdict of guilty on each of counts 1 and 2 - Jury polled - trial concluded - jury discharged - at the request of the defts all motions to be filed on or before June 11, 1976 - bail contd. sentence adjd without date -				
5-11-75	By DOOLING J - Order of sustenance signed for lunch.				
5-10-76	Before DOOLING J - case called - trial resumed - defts move for Judgment of acquittal - decision reserved - defts rest - both defts move for Judgment of acquittal - motions denied - Govts summation - Defts summations - Govts rebuttal summation - jury charged - alt. jurors discharged - Marshals sworn - jury retires to deliberate - jury deliberations contd to May 11, 1976.				
7-9-76	Before DOOLING, J. - Case called. Deft & Counsel Michael Baker present on the jury's verdict of guilty on Counts 1 & 2 of the indictment the deft is sentenced on each count for a period of 3 yrs pursuant to the provisions of Section 3651; to be confined for 6 months to a jail type institution and execution of the remainder of the sentence, that is 30 months as suspended and the deft is placed on probation for 3 yrs commencing on the date of the release from custody, the sentences on the 2 counts to run concurrently. Deft advised of his right to appeal. Deft contd on P.A.B. pending appeal. Clerk to file Notice of Appeal w/o fee.				
7-9-76	Judgment & Commitment filed. Certified copies sent to U.S. Marshals & Probation.				
7-9-76	Notice of appeal filed. Duplicate of appeal & duplicate of docket entries mailed to C of A. jn				
7-16-76	Stenographers transcript filed dated May 6, 1976				
7-28-76	Record on appeal certified and mailed to the court of appeals				
8/10/76	Acknowledgment received from the Court of Appeals that the Index to Record on Appeal has been received.				
9-10-76	4 transcripts filed (two dated May 5, 1976; dated May 7 and May 10, 1976 respectively)				

(a) (b) (c) (d)
Interval Start Date Ltr. Total
(per Section II) End Date Code Days

GERBASIO, ANGELO

2
defendantNo 2
of Defendants

DOOLING, J.

18-6, 371 & 2 Did conspire to embezzle and unlaw-
fully take from JFK Airport goods
moving in i

CLOSED

U.S. Attorney or Asst.
Levin-EpsteinDefense CJA X Pet. Waived. For None Other FD, LUD
M. Washor, 16 Court St.,
BKlyn, NY. TR 5-1292COUNTS
2

MAGR. CASE NO 75 M 18-

COIL RELEASE
☐ Personal Recog
Denied ☐ Unsecured Bon
AMT ☐ Conditional Release
Set (000) ☐ 10% Dep
\$ 5 ☐ Surety Bo
07/23/75 ☐ Collateral
date ☐ Bail Not
Made ☐ 3rd Party
Bail Status Custody
Changed ☐ PSA
(See Docket)

ARREST

INDICTMENT

ARRAIGNMENT

TRIAL

SENTENCE

U.S. Custody
Began on Above
Charges☐ High Risk
Defn. &
Date Design'dInformation ☐
12918-75
Waived ☐
Superseding
☐ Indict/Info

1-8-76

1st Plea
II
Final PleaTrial Set For
4-5-76☒ Not Guilty
☐ No
☐ Guilty
☐ Not
☐ GuiltyVerdict
5/5/76Trial Set For
5/5/76
Trial End
5/11/76

Disposition

☒ Convicted ☐ On All Chgs
☐ Acquitted ☐ On Lesser
Offense
☐ Dismissed ☐ WOP; ☐ W
☐ Nolle/Discontinued

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING		<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District CJ <input checked="" type="checkbox"/> Held to Answer to U. S. District Court AT: EDNY
Summons	Issued			<input checked="" type="checkbox"/> Waived <input type="checkbox"/> Not Waived		<input type="checkbox"/> Exonerated <input type="checkbox"/> To Transferee District
	Served			<input type="checkbox"/> Intervening Indictment		
Arrest Warrant						
COMPLAINT		10/23/75	VAC/070A	Tape No.	INITIAL/No.	Magistrate's Initials VAC/070A
OFFENSE (In Complaint)	Possession of stolen goods from Foreign shipment. T-18 USC Section 659.					

Show last names and suffix numbers of other defendants on same indictment/information

DATE DELUCA 1 PROCEEDINGS

10-23-75 Arraignment - AUSA Levin-Epstein D.C. Will Get Own Atty

11-18-75 Hearing waived on both defts by D.C. telephonically - letter to follow.

11-19-75 Letter of confirmation recd. on waiver of hearing - D.C. Michael Washor, Esq. 16 Court St, B'klyn, NY TR 5-1292

12-18-75 Before JUDD, J - Indictment filed.

1-8-76 Before JUDD, j - case called - deft & atty present - deft arraigned and enters a plea of not guilty - bail conditions contd - case adjd to 4-5-76 for trial.

1-8-76 Notice of Appearance filed

1-29-76 Notice of Motion filed, ret. 2-13-76, for Discovery, Bill of Particulars, etc.

2/13/76 Before JUDD, J. - Case called - Adjd to 2/20/76

2-20-76 Before JUDD, J - case called - deft not present - counsel M. Washor present - motion for discovery argued - motion denied in part and granted in part as indicated on the record. Case adjd to 4-5-76 for status report.

4-5-76 Before JUDD, J - case called - deft & atty present - deft waives 6 month rule (speedy trial) case adjd to May 5, 1976 for trial on consent of both sides.

V. Excludable Delay
(a) (b) (c) (d)

IV. PROCEEDINGS (continued)

V. EXCLUDABLE DELAY

(a) (b) (c) (d)

5/5/76	Before DOOLING, J. - case called - deft and counsel present - trial ordered and begun - jurors selected and sworn - hearing order and begun on motion to suppress-hearing contd 5/6/76 at 9:30 A.M.				
5/6/76	Before DOOLING, J. - Case called - deft and counsel present - hearing suppression resumed - hearing concluded - motion to suppress denied and granted as indicated trial contd to 5/7/76				
5/6/76	Govt's request to charge filed				
5/7/76	Before DOOLING, J. - Case called - deft and counsel present - trial resumed - trial contd to 5/10/76				
5-11-76	Defts' request to charge filed.				
5-11-76	By DOOLING J - Order of sustenance signed for lunch.				
5-11-76	Before DOOLING J a - case called - deft & counsel present - Jury deliberations resumed - Jury returned and rendered a verdict of guilty on each of counts 1 and 2 - jury polled - trial concluded - jury discharged - sentence adjd without date - at the request of the defts all motions to be filed on or before June 11, 1976 - bail contd.				
5-10-76	Before DOOLING J - case called - trial resumed - defts move for Judgment of acquittal - decision reserved - defts rest - deft moves for Judgment of acquittal - motion denied - Govts summation - defts summations - Govts rebuttal summation - trial Jury charged - alt. jurors discharged - Marshals sworn - jury retires to deliberate - jury deliberations contd to 5-11-76				
7-8-76	Before DOOLING, J. - Case called. Deft & counsel present. Motion for judgment of acquittal argued & denied.				
7-9-76	Notice of motion for judgment of acquittal filed. (judge to set date).				
7-9-76	Case called deft & Counsel at 8:30 a.m. present. On the jury's verdict of guilty on Counts 1 & 2 of the indictment the deft is sentenced on each count for a period of 3 yrs pursuant to the provisions of § 3651 to be confined for 3 months to a jail type institution and execution of the remainder of the sentence, that is 33 months is suspended and the deft is placed on probation for 3 yrs commencing on the date of his release from custody, the sentences on the 2 counts are to run concurrently. Deft advised of his right to appeal. Deft could on P.A. pending appeal. XXXXXX				
7-9-76	Judgment & Commitment filed. Certified copies to U.S. Marshals & Probation.				
7-12-76	Motion of deft denied. (7/8/76).				
7-16-76	Stenographers transcript filed dated May 16, 1976 filed				
7-29-76	Notice of appeal filed.				
7-29-76	Docket entries and duplicate of notice mailed to the court of appeals. Record on appeal certified and mailed 7-28-76 for co-deft Mario DeLucia and applies to this deft - court of appeals notified.				
8/10/76	Acknowledgment of receipt received from the Court Of Appeals that the Supplemental record on appeal has been received.				
8/11/76	Stenographers transcript dated 8/10/76 filed.				
9-10-76	4 transcripts filed (2 dated May 9; one dated May 7 and one dated May 10, 1976 respectively)				

(a) (b) (c) (d)
Interval Start Date Ltr. Total
(per Section II) End Date Code Days

RJD:EL-E:sm
F. #753,633

FILED
IN CLERK'S OFFICE
S. DISTRICT COURT E.D. N.Y.
★ DEC 18 1975 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

MARIO J. DELUCIA and
ANGELO GERBASIO,

Defendant's.

----- X

INDICTMENT

Cr. No. _____
(T. 18, U.S.C., §659, §371
and §2)

75 CR 065

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 23rd day of October 1975, within the Eastern District of New York, the defendant MARIO J. DELUCIA and the defendant ANGELO GERBASIO, with intent to convert to their own use, did wilfully and knowingly embezzle, steal and unlawfully take from Cargo Building 67, John F. Kennedy International Airport, Queens, New York, a quantity of women's coats, having a value in excess of One Hundred Dollars (\$100.00), which goods were moving as and constituting a foreign shipment of freight from Taiwan, Republic of China to New York, New York. (Title 18, United States Code, Sections 659 and 2).

COUNT TWO

On or about and between the 20th day of October 1975, and the 23rd day of October 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendant MARIO J. DELUCIA and the defendant ANGELO GERBASIO, did knowingly and wilfully conspire to commit offenses against the United States, in violation of Title 18, United States Code, Section 659, by conspiring to unlawfully take from Cargo Building 67, John F. Kennedy

International Airport, Queens, New York, a quantity of women's coats, having a value in excess of One Hundred Dollars (\$100.00) which goods were moving as and constituting a foreign shipment of freight from Taiwan, Republic of China, to New York, New York, and further, to unlawfully receive and have in their possession the said coats, the aforesaid defendants knowing the same to have been stolen.

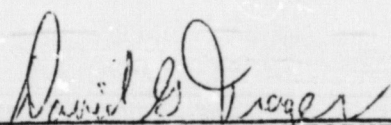
In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, within the Eastern District of New York, the defendant MARIO J. DELUCIA and the defendant ANGELO GERBASIO committed, among others, the following:

COVERT ACT

On or about October 23, 1975, within the Eastern District of New York, the defendant MARIO J. DELUCIA and the defendant ANGELO GERBASIO traveled together, in a motor truck from John F. Kennedy International Airport, Queens, New York, to Staten Island, New York. (Title 18, United States Code, Section 371).

A TRUE BILL.


FOREMAN


UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

C

COURT'S CHARGE

THE COURT: Members of the jury:

You have heard the evidence in the case and the arguments of counsel and now must receive the instructions on the law that governs the case.

You, the jurors, are the sole judges of the facts. You must, however, follow the law as given to you in these instructions and apply it to the facts as you find them from the evidence before you. You are not free, nor am I, to substitute our private judgment as to what

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know. Let's send them home now before they start thinking.

Let's reinstruct them and send them home.

MR. SCHACHER: Tomorrow morning I think.

MR. LEVIN-EPSTEIN: I prefer they not spend the night thinking about it improperly.

THE COURT: I think they're still working on count one.

MR. WASHOR: That is a concern of mine also. Might it be if they have concluded it and reached a decision a curative instruction at this time presents quite a problem not knowing --

MR. LEVIN-EPSTEIN: Why is -- exactly why we shouldn't ask --

THE COURT: It's dangerous to instruct a jury.

MR. LEVIN-EPSTEIN: Generally speaking.

THE COURT: Because you can't tell when they'll follow the instruction.

MR. LEVIN-EPSTEIN: I would ask the Court to give the correct instruction right now.

THE COURT: Two things I'll say since it is 5:30, I'll say to them I assume they have not reached a decision to either defendant in either count.

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2 MR. WASHOR: If they acknowledge that may I
3 ask that you instruct them in the morning.

4 (Whereupon the following was held in open court.)

5 THE COURT: Now, I assume members of the jury
6 you have not reached a verdict as to either defendant
7 on either count I take it that is right.

8 And before excusing you I want to read to you
9 again the essential elements of count two because counsel
10 directing my attention to the fact that there is, was
11 a displaced clause in the reading. And so I want to
12 reread it to you now just before excusing you so that
13 I don't want to abbreviate it. The essential elements
14 of count two all of which the government must establish
15 beyond a reasonable doubt or else he must acquit the
16 defendant whose case you are considering are the follow-
17 ing:

18 FIRST, that a conspiracy was formed to steal
19 goods moving as, or constituting part of the foreign
20 shipment of freight or to have possession of goods so
21 stolen;

22 SECOND, that the defendant whose case you are
23 considering become a member of the conspiracy knowing
24 that the conspiracy was one to steal goods or to receive
25 and possess the stolen goods; and

852

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2 THIRD, that for the purpose of carrying forward
3 that conspiracy the defendants traveled together by
4 truck from JFK Airport to Staten Island. If the govern-
5 ment has proved each essential element of count two be-
6 yond a reasonable doubt you will find the defendant
7 whose case you are considering guilty on count two. If
8 the government fails to prove any one or more of the
9 essential elements of count two beyond a reasonable
10 doubt you must acquit the defendant whose case you are
11 considering on count two.

12 Now, I should say to you that in permitting
13 juries to separate, go home, sleep in their own beds
14 get their legs under their own dinner tables we're
15 doing something which is relatively new in the administ-
16 ration of jurors in our country.

17 Traditionally jurors were never allowed to sep-
18 arate until they've reached a verdict no matter how late
19 in the night it was, how cold it was, whether the fire
20 had gone out or not. And as you can see that was not
21 an ideal way to get jurors to deliberate sensibly. So,
22 after several centuries that has been changed.

23 Jurors are now allowed to separate but you must
24 bear in mind why it was that they were not allowed to
25 separate. That is because the overwhelming importance

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2 of protecting the jury deliberation from any outside
3 intrusion. You 12 people are the only people in the
4 world who are competent to decide this case, only you
5 have heard the evidence sworn to subject to cross exam-
6 ination, exhibits, that have been looked over by counsel
7 argued about and finally qualified for admission in evi-
8 dence before you. What everybody else could possibly
9 know about this case. Only you really know this case
10 and only you are competent to decide. Now, you and you
11 alone are sworn to decide it and counsel have determined
12 that you are all free of any interests on either side
13 of the case, so that again you are alone, counsel is on
14 one or the other side, you're not. In this purview
15 that we have been afforded here together only you have
16 done nothing but listen to the evidence and now are
17 ready having heard both sides disinterestedly determine,
18 no one else just you. So, it's important particularly
19 when you separate now that you discuss the case with
20 absolutely no one. Not your most trusted advisor, your
21 spouse above all, your most trusted advisor because this
22 is one time when he or she no matter how wise and judi-
23 cious cannot help and can only hurt.

24 So, it's an absolute imperative that you not
25 discuss the case with anyone not on the jury. And when

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2 you do separate if any two or three of you are traveling
3 together to Brooklyn together, do not discuss the case
4 because just as sure as shooting someone of you will
5 say something to one of the others that you'll never
6 repeat and yet which may maybe very important to anyone
7 who hears it from you decisive in their thinking or im-
8 portant in their thinking and the other jurors will
9 never have heard it, you said it once, you may not re-
10 peat it. It's important that you discuss the case only
11 when you are all together, remembering that it's the
12 way you're temporarily body is incorporated equipped
13 through your common deliberation to decide this case.
14 Now, remember overnight the administration of justice
15 is in your hands and it's most sensitive moment, it's
16 in your trust and I know you will not betray it. Good
17 night, see you tomorrow.

18 Don't check in downstairs come directly to the
19 jury room tomorrow morning at 10 o'clock.

20 (Whereupon at this time a recess was held until
21 May 11th, 1976.)
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1
2 the law should be for what the law in fact is.

3 You have been sworn as jurors well and truly to
4 try this case and to render a true verdict. You must
5 therefore exclude from your deliberations all bias and
6 prejudice. You must not permit yourselves to be governed
7 by sympathy or any other consideration not founded in
8 the evidence and these instructions on the law.

9 The issue of fact to be tried are those made by
10 the indictment and the defendants pleas of, "not guilty."
11 Bear in mind that the indictment is the formal method
12 of accusing a person of a crime; it is not itself evi-
13 dence that a defendant committed the crime charged, nor
14 is the fact that the indictment was found any evidence
15 of guilt.

16 Count one of the indictment is drawn under Section
17 659 of Title 18, United States Code, which provides, so
18 far as we are concerned with it that, "whoever embezzles,
19 steals, or unlawfully takes -- with intent to convert
20 to his own use any goods moving as, or which constitute
21 a foreign shipment of freight, shall be fined or impris-
22 oned or both. Count one reads as follows.

23 On or about the 21st day of October 1975 within
24 the Eastern District of New York the defendant Mario J.
25 DeLucia and the defendant Angelo Gerbasio with intent to

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2 convert to their own use, did wilfully and knowledgeably
3 embezzle, steal and unlawfully take from cargo building
4 67, John F. Kennedy International Airport Queens New
5 York a quantity of women's coats having a value in ex-
6 cess of \$100 which goods were moving as and constituting
7 a foreign shipment of freight from Taiwan, Republic of
8 China to New York, New York. The cases of two defendants
9 are before you for consideration on two counts.

10 The case of each defendant on each count as
11 against him must be considered separately on the basis
12 of the evidence introduced before you as it affects
13 that defendant on that count. You will be asked to re-
14 turn separate verdicts on each count as to each defend-
15 ant, and in so much as your verdict on each count as
16 to each defendant must depend on the state of the evi-
17 dence relevant to that count as it affects that defend-
18 ant your verdict as to one defendant may differ as be-
19 tween the two counts. And your verdict may differ as
20 to each count as between the two defendants. To emph-
21 asize this I will in general speak of, "the defendant"
22 in these instructions.

23 The essential elements of count one, all of which
24 the government must prove beyond a reasonable doubt or
25 else you must acquit the defendant whose case you are

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2 considering on count one are the following:

3 First, that the women's coats in question were
4 moving as constituted a foreign shipment of freight at
5 the time they were stored in cargo building 67 at John
6 F. Kennedy International Airport;

7 Second, that the defendant actively participated
8 in taking the women's coats on October 23, 1975;

9 Third that the women's coats were taken from
10 cargo building 67 without the consent of their owner or
11 the authorities in charge of cargo building 67:

12 Fourth, the defendants' participation in the
13 taking of the women's coats was a conscious and intent-
14 ional participation carried out with the knowledge that
15 he was taking part in stealing for his own use, goods
16 belonging to others.

17 If the government proves each of these four ess-
18 sential elements beyond a reasonable doubt, you will find
19 the defendants guilty on count one. If the government
20 fails to prove any one, or more, or all of the essential
21 elements of count one, then you must acquit the defend-
22 ant on count one.

23 The first essential element requires proof that
24 the women's coats were part of a foreign shipment of
25 freight. The statute provides that the way bill, or the

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2 shipping document shall be evidence from which you may
3 find the place from which, and the place to which a ship-
4 ment was made.

5 Goods are moving as or constitute a foreign ship-
6 ment of freight, if they are in the hands of an airline
7 or other common carrier in the ordinary course of trans-
8 portation from a shipper in a foreign country to a con-
9 signee in a state of the United States. Stops in the
10 course of transportation at a carrier terminal such as
11 a cargo building for breakup and transfer of shipment
12 for local delivery do not bring the foreign shipment
13 of freight to an end. The foreign movement of the
14 shipment of freight normally ends only when the ultimate
15 carrier makes delivery of the goods to the consignee.
16 It is for you to say from the evidence whether the ship-
17 ment was still moving as part of a foreign shipment of
18 freight at the time when the coats were in cargo build-
19 ing 67 at JFK Airport.

20 The government does not have to prove that the
21 defendant knew that the shipment was a foreign shipment.

22 The second essential element is that the defend-
23 ants actively participated in the taking of the coats.

24 Whereas in the present case two persons are charged
25 together with the commission of an offense, the govern-

1
2 ment is not required to prove that one of the defendants
3 alone did all of the things required to make out the
4 offense. On the contrary, under the law as embodied
5 in Section 2 of Title 18 of the United States Code, all
6 those who aid and abet the commission of an offense, or
7 cause an act to be done which if directly performed
8 would be an offense are treated as equally guilty of
9 the crime, that is, they are punishable as principal
10 offenders. Hence, if a person voluntarily unites his
11 efforts with one or more others to bring about the comm-
12 ission of a crime, he's equally guilty with the others
13 and they with him, provided he is conscious of the nat-
14 ure of the criminal venture and intentionally associates
15 himself in its furtherance and actively participates in
16 bringing about the accomplishment of the criminal vent-
17 ure. You must determine from all of the evidence whether
18 you are satisfied beyond a reasonable doubt that the
19 defendants participated in the taking of women's coats
20 from cargo building 67.

21 However, a person is not a guilty participant
22 if he is merely present during the commission of a crime,
23 even though the person is aware that a crime is being
24 committed and does nothing to stop it, provided he does
25 not in any way participate in or help in the commission

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2 of the crime knowing that he is helping to commit it.

3 The third essential element is that the coats
4 were taken without the consent of their owner or the
5 authorities in charge of cargo building 67. It would
6 not be consent if such persons simply stored the coats
7 at such a place and in such a manner that their taking
8 was made possible, or was merely facilitated. Nor is
9 it consent if the Pan-Am representatives, believing that
10 a theft was to be attempted, did not prevent it, but
11 rather advised the FBI of what Pan-Am had been told,
12 and Pan-Am's agent Godoy then kept the FBI advised of
13 what he observed in warehouse 67.

14 The fourth essential element is that the defend-
15 ant's participation was conscious and intentional and
16 was undertaken with the knowledge that he was taking
17 part in stealing for his own use, goods belonging to
18 others. The government is not required to prove a de-
19 fendant's knowledge by direct evidence such as by prov-
20 ing the defendant's own words fully expressing his
21 thoughts. But, the government must prove facts and cir-
22 cumstances from which you are able to and do infer the
23 defendant's knowledge and his intention beyond a reason-
24 able doubt.

25 If it is shown that a defendant, alone or with

1
2 another, is in possession of goods that have been re-
3 cently stolen, then, unless an innocent explanation of
4 that possession appears from the evidence, you may al-
5 though you are not required to, infer and conclude that
6 the defendant knew that the goods were stolen goods. In
7 the present case, as to Defendant Gerbasio, you must
8 first be satisfied from the evidence that he knew the
9 cartons were in the Pan-Am truck when he was riding in
10 the truck and assisted in gassing it. Defendant Ger-
11 basio's presence in the passenger's seat of the Pan-Am
12 truck is not enough, standing alone, to authorize you
13 to infer and conclude that he knew the cartons were in
14 the truck. (Clunn, 4th 57 Fed 2d 1273, 1275) But, if
15 you conclude from all the evidence in the case and from
16 the circumstances that he did know that the cartons
17 were in the truck, then you may find the defendant Ger-
18 basio had possession of the cartons, along with the de-
19 fendant DeLucia. In this connection, bear in mind that
20 one who, in circumstances that should have alerted him,
21 deliberately fails to inquire or closes his eyes to the
22 obvious for the very purpose of avoiding learning the
23 facts, may be treated as if he did know what he would
24 readily have learned had he inquired or made a simple
25 observation. Let me repeat the essential elements of

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2 count one.

3 The essential elements of count one, all of which
4 the government must prove beyond a reasonable doubt or
5 else you must acquit the defendant whose case you are
6 considering on count one are the following:

7 FIRST, the women's coats in question were moving
8 as, or constituted a foreign shipment of freight at the
9 time they were stored in cargo building 67 at John F.
10 Kennedy International Airport:

11 SECOND, that the defendant actively participated
12 in taking the women's coats on October 23, 1975:

13 THIRD, that the women's coats were taken from
14 cargo building 67 without the consent of their owner
15 or the authorities in charge of cargo building 67:

16 FOURTH, that the defendant's participation in the
17 taking of the women's coats was a conscious and intent-
18 ional participation carried out with the knowledge that
19 he was taking part in stealing for his own use goods
20 belonging to others.

21 If the government proves each of these four
22 essential elements beyond a reasonable doubt, you will
23 find the defendant s guilty on count one. If the govern-
24 ment fails to prove any one, or more, or all of the ess-
25 ential elements of count one, then you must acquit the

1
2 defendant on count one.

3 Count two charges the defendants with conspiring
4 with each other to commit the offense of count one, that
5 is, to take women's coats in violation of the law, and
6 further, to commit the crime of receiving those coats
7 and having them in their possession while knowing they
8 were stolen. The count is drawn under Title 18, United
9 States Code Section 371, which, so far as we are con-
10 cerned with it, provides,

11 "If two or more persons conspire to commit any
12 offense against the United States and one or more of
13 such persons do any act to effect the object of the
14 conspiracy, each shall be fined or imprisoned or both.

15 Count two reads as follows:

16 On or about and between the 20th day of October
17 1975 and the 23rd day of October 1975, both dates being
18 approximate and inclusive within the eastern district
19 of New York, the defendant Mario J. DeLucia and the
20 defendant Angelo Gerbasio did knowingly and wilfully
21 conspire to commit offenses against the United States,
22 in violation of Title 18 United States Code Section 659,
23 by one, the conspiring to unlawfully take from cargo
24 building 67 at the John F. Kennedy International Airport
25 Queens New York a quantity of women's coats having in

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2 value in excess of \$100, which goods were having as and
3 instituting a foreign shipment of freight from Taiwan,
4 Republic of China to New York, New York and further to
5 unlawfully receive and have in their possession the
6 said coats, the information said defendants knowing
7 the same to have been stolen. In furtherance unlawful
8 conspiracy and for the purpose of effecting the object-
9 ives thereof within the eastern district of New York,
10 the defendant Mario J. DeLucia and the defendant Angelo
11 Gerbasio at this time committed among other things the
12 following overt act.

13 On or about October 23, 1975 within the eastern
14 district of New York the defendant Mario J. DeLucia and
15 the defendant Angelo Gerbasio traveled together in a
16 motor truck from John F. Kennedy International Airport
17 Queens New York, to Staten Island New York.

18 Now, conspiracy is an offense separate from the
19 commission of an offense that may have been committed
20 pursuant to the conspiracy. That is because the format-
21 ion of a conspiracy, of a partnership in criminal pur-
22 pose, is in and of itself pronounced a crime by the
23 statute. A conspiracy is a combination of agreement of
24 two or more persons to accomplish an unlawful purpose
25 by their concerted action. The essence of the charge

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2 of conspiracy is first, an understanding among two or
3 more persons that they will act together to accomplish
4 a common objective which they know is unlawful, plus,
5 second, the doing of an overt act in furtherance of
6 the conspiracy. The understanding does not have to be
7 a formal or expressed one. The understanding essential
8 to the finding of a conspiracy exists if by whatever
9 means, pact or outspoken, the alleged member of the
10 alleged conspiracy have arranged to unite their sev-
11 eral efforts to accomplish a common object that they
12 know is unlawful.

13 One may become a member of a conspiracy without
14 having full knowledge of all of the details of the con-
15 spiracy and without knowing the identities of the other
16 conspirators. But, a person who, having no knowledge
17 of a conspiracy, acts in a way which furthers some ob-
18 ject of the conspiracy, does not thereby become a con-
19 spirator. Before you may find that a defendant, or any
20 other person, has become a member of a conspiracy, the
21 evidence in the case must show beyond a reasonable doubt
22 that the conspiracy was formed, and that the defendant,
23 or other person who is claimed to have become a member,
24 helped to carry the plan forward knowing the principal
25 terms of the plan and that it was unlawful and having

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2 the intent to advance or further some object of the
3 conspiracy.

4 The overt act required to be proved may be an
5 act which, considered by itself, is an innocent act.

6 The overt act must be one of the overt acts
7 alleged in the indictment and it must be committed by
8 one of the conspirators with the conscious purpose of
9 furthering the achievement of the objective of the con-
10 spiracy.

11 One who is a conspirator is answerable not only
12 for his own acts but also for the acts of his co-con-
13 spirators done in furtherance of the conspiracy.

14 The essential elements of count two, all of which
15 the government must establish beyond a reasonable doubt
16 or else must acquit the defendant whose case you are
17 considering are the following:

18 FIRST, that the conspiracy to steal or to have
19 in their possession the women's coats described in the
20 indictment was formed;

21 SECOND, that the defendant whose case you are
22 considering became a member of the conspiracy knowing
23 that the conspiracy was one to steal goods moving as,
24 or constituting part of a foreign shipment of freight
25 or to receive and possess the stolen goods; and

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2 THIRD, that for the purpose of carrying forward
3 the conspiracy, the defendants traveled together by
4 truck from JFK Airport to Staten Island.

5 If the government proves each essential element
6 of the count two beyond a reasonable doubt, you will
7 find the defendant whose case you are considering guilty
8 on count two. If the government fails to prove any one
9 or more of the essential elements of count two beyond
10 a reasonable doubt, you must acquit the defendant whose
11 case you are considering on count two.

12 It is not for you to say upon all the evidence
13 whether or not you are satisfied that the government
14 has proved the conspiracy alleged in the indictment as
15 against each of the defendants considering the case of
16 each defendant separately. Your first task is to de-
17 termine what sequence of events you find that the evi-
18 dence establishes and then to determine whether there
19 was a plan or program agreed to by the two defendants
20 and whether it embraced both the theft and the receipt
21 and possession of the woman's coats.

22 In weighing the evidence on each count you may
23 come to consider the statements that were made after
24 arrest and you will recognize that each defendant's
25 statement, if true, would tend to exclude him of the

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2 crimes charged. If, however, you find that defendart's
3 exculpatory statement was false, then you may, but you
4 are not required to, consider it evidence of guilt, for
5 you may consider that one who was innocent would not
6 have any occasion to tell an untruth about his connect-
7 ion with the matter. The term reasonable doubt is used
8 repeatedly in these instructions.

9 Proof beyond a reasonable doubt is not proof to
10 an absolute certainty. Few things in life can be so
11 proved. Proof beyond a reasonable doubt is such proof
12 as you would be willing to rely and act upon in the
13 most important of your own affairs, if after carefully
14 weighing all the evidence you have an abiding convict-
15 ion of the truth of the charge such that you feel con-
16 scientiously bound to act upon it, then you would be
17 free from reasonable doubt. If, however, after weigh-
18 ing all the evidence, you have such a doubt as would
19 cause prudent persons to hesitate before acting in matt-
20 ers of importance to themselves, such a doubt would be
21 a reasonable doubt.

22 That does not mean that each bit of the govern-
23 ment's evidence must be found by you to be true beyond
24 a reasonable doubt. It means rather that in sum total
25 the government's evidence must satisfy you beyond a

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2 reasonable doubt as to each element of the crime charged,
3 or you must acquit.

4 A reasonable doubt may arise not only from the
5 evidence produced, but also from the lack of evidence.
6 since the burden of proof is always on the government,
7 a defendant has the right to rely on the failure of the
8 government to prove any essential elements of the charge.
9 A defendant may rely too on evidence brought out on his
10 cross examination of witnesses called by the government.
11 The law does not impose on a defendant the burden or
12 duty of producing any evidence.

13 Under our law a defendant has a constitutional
14 right to remain silent. No inference unfavorable to
15 the defendant can be drawn from that fact. Your de-
16 liberations accordingly must exclude consideration of,
17 or reference to the matter and it must concern itself
18 solely with the evidence before you.

19 A defendant is presumed to be innocent and that
20 presumption accompanies him throughout the trial. It
21 continues unless you are satisfied on all the evidence
22 that the government has proved defendant's guilt beyond
23 a reasonable doubt.

24 I will not summarize the evidence.

25 You have heard ten witnesses, exhibits have been

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2 received in evidence. I have said that you must decide
3 the case on the evidence.

4 The evidence is the testimony of these witnesses,
5 the exhibits received in evidence and the goods which
6 have been stipulated.

7 Statements and arguments of counsel and answers
8 stricken from the record are not evidence.

9 The evidence includes, of course, what is brought
10 out on cross examination as well as what is testified
11 under direct examination.

12 Your verdict must be based on the evidence. But,
13 in your consideration of the evidence you are not limited
14 to the bare words of the witnesses and the bald facts
15 that you find have been proved. The evidence includes
16 the inferences reasonably to be drawn from the testimony
17 which you hear and the facts which you find have been
18 proved.

19 You are the sole judges of the credibility of
20 the witnesses.

21 The motives and state of mind of each witness as
22 they appear to you and the circumstances and inducements
23 under which the witness testified are to be taken into
24 account. Consider any relation each witness may bear
25 to either side of the case and the manner in which the

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2 verdict might affect him.

3 You may consider the appearance and manner of
4 each witness on the witness stand, the witness's app-
5 arent candor or lack of it, and the character of the
6 testimony given, whether the testimony contains incon-
7 sistencies or discrepancies, whether it is intrinsically
8 credible or seems to you in whole or part improbable,
9 and whether it conflicts with other testimony or is con-
10 sistent with other testimony in the case.

11 In weighing the effects of conflict or discrep-
12 ancy consider whether it pertains to a matter of import-
13 ance or to unimportant details and whether it seems to
14 you to result from innocent error or from falsehood.
15 If you find a witness has been mistaken or untruthful,
16 in all or in part of the testimony given, then you may
17 give the testimony of that witness such credit, if any,
18 as you think it deserves in the light of the nature
19 and extent of the defects that you find in it.

20 Evidence that an earlier time a witness made a
21 statement inconsistent with or contradictory of that
22 witness's testimony here in your presence justifies you
23 in rejecting the testimony given before you on that
24 point but does not require you to reject the testimony.
25 You must decide in the light of the inconsistency and

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2 all the other factors bearing on the credibiliti of the
3 testimony whether you do, or do not accept it as true.
4 You do not, however, take the earlier statement as est-
5 ablishing the true facts; rather, you treat it as at
6 most nullifying the testimony given in court here.

7 If, however, a witness adopts as true a state-
8 ment he made out of court at an earlier time, then you
9 may treat that out of court statement as the witness's
10 evidence.

11 If you conclude that a witness has knowingly
12 testified falsely about any material matter, you have
13 a right to distrust that witness, testimony in other
14 particulars. You may reject all the witness's test-
15 imony or give it or parts of it the credence you think
16 it deserves.

17 I have sought not to comment from the evidence
18 or to give any impression as to my own view, if I have
19 one, of the relative weight of the evidence. If I
20 have done so, however, you may disregard it entirely
21 for you are the sole judges of the facts.

22 From time to time in the course of the trial ob-
23 jections have been made and rulings on evidence given.
24 Draw no inferences from the comparative frequency of
25 objections of one or the other side, or form the compar-

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2 ative record in having objections sustained. Where an
3 objection to a question has been sustained, disregard
4 the question and draw no inference from its wording
5 about the answer that might have been given. Where an
6 objection is overruled, evidence then received has no
7 special weight just because unsuccessfully objected to.

8 Your verdict must be unanimous.

9 It is your duty as jurors to consult with one
10 another and to deliberate with a view to reaching agree-
11 ment if you can do so without doing violence to individ-
12 ual judgment. Each of you must decide the case for your-
13 self but do so only after an impartial consideration of
14 the evidence with your fellow jurors. In the course of
15 your deliberations do not hesitate to reexamine your
16 own views and change your opinion if convinced it is
17 erroneous. Your task is one of conscience, and pride
18 of opinion has no place in matters of conscience. But
19 do not surrender your honest conviction as to the weight
20 or effect of evidence solely because of the opinion of
21 your fellow jurors or for the mere purpose of returning
22 a verdict.

23 The form of your verdict, which must be given
24 separately on each count for each defendant, is simple.
25 Your verdict must be either guilty or not guilty, it

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2 must be given separately for each count as to each de-
3 fendant, and it must be a unanimous verdict on each
4 count as to each defendant. Your verdict need not be
5 the same on all counts as to any one defendant, nor
6 need the verdict on any count be the same as to all
7 defendants.

8 Your verdict on each count will be delivered
9 orally here in open court by your foreman in response
10 to questions which the deputy clerk of court will add-
11 ress to her.

12 You are not partisans, you are judges, judges
13 of the facts. Your sole interest is to ascertain the
14 truth from the evidence in the case.

15 When you have reached a verdict and are ready
16 to report, simply advise the marshall that you have
17 reached a verdict without disclosing orally or in writ-
18 ing what your verdict is.

19 Your verdict must not be disclosed to anyone
20 before you deliver it orally in the court room in re-
21 sponse to the questions of the clerk of the court.

22 If you wish to communicate with the Court do so
23 in writing, using the foreman, juror number one as your
24 intermediary and spokesman. Notify the marshall when
25 you have any such communication.

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3 There will now be a short recess during which
4 counsel will review the charge with me to make certain
5 that nothing has been omitted or misspoken. Then you
6 will retire to the jury room to deliberate your verdict.
7 If you wish, a form can be supplied to you so that no
8 confusion as to the form of verdict arises.

9 Mr. Delpuca and Mr. Krumlich, bring your hats
10 and coats with you because at that point, if nothing
11 happens between now and then you will be discharged from
12 the service on the jury. Please do not start on your
13 deliberations since Mr. Delpuca and Mr. Krumlich are
14 still with you and they will be off the jury in just a
15 minute.

16 (Whereupon the following was held outside the
17 presence of the jury.)

18 MR. WASHOR: For the record, can I take ex-
19 ception to those portions of the charge heretofore ex-
20 cepted to at the prior discussion without reiterating
21 them in their entirety?

22 THE COURT: The one we red-flagged as we went
23 through the procedure of clearing the charge, those,
24 right?

25 MR. SCHACHER: That is correct, Your Honor.

 THE COURT: Have you seen this jury memorandum

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2 form?

3 MR. LEVIN-EPSTEIN: I haven't but I think
4 it's fine to me.

5 (Whereupon the trial resumed in open court.)

6 THE COURT: Now, there will be no additional
7 instructions members of the jury, at this point the
8 marshalls will be sworn, take you into custody until
9 you reach a verdict.

10 (Whereupon the marshalls were sworn by the clerk
11 of the court.)

12 THE COURT: Members of the jury, the marshalls
13 will be taking you out and begin your deliberations, let
14 me say to you we do not continue deliberations far into
15 the night so you don't have to worry about getting bad
16 dinner tonight. Or having to sleep in the St. George
17 Hotel or equal, but at 5:30 will separate under instr-
18 uctions to you if you have not then reached a verdict
19 and resume deliberation at 10 o'clock tomorrow morning.
20 So, we think that is a great deal better than crowding,
21 attempting to crowd you and perhaps sacrifice deliber-
22 ation to the wish to avoid inconvenience.

23 (Whereupon the following was held outside the
24 presence of the jury.)

25 MR. WASHOR: We consent to the swearing of any

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2 relief marshalls without the resuming of all parties
3 and the jury to the court.

4 THE COURT: And the practice which referred
5 to messages is if the jurors have messages they give
6 them to the marshall, the marshall shows them to me,
7 if they're innocent then I authorize the marshall to
8 make the phone call or whatever it is and he does so.
9 The jurors of course are not allowed to talk on the
10 telephone.

11 MR. WASHOR: No objection to Your Honor screen-
12 ing the innocence of the messages of the jury.

13 MR. SCHACHER: What can I say.

14 (After a short recess.)

15 MR. LEVIN-EPSTEIN: Your Honor, I think Mr.
16 Washor and I are in agreement of what Court Exhibit One
17 is, but I think Mr. Schacher takes issue.

18 MR. SCHACHER: What the interpretation is that
19 they want.

20 MR. LEVIN-EPSTEIN: I think Mr. Washor agrees
21 with me the essential elements they're speaking of is
22 the four elements and the count.

23 THE COURT: I think they mean page 7.

24 MR. SCHACHER: If they want it I think it's
25 page 7.

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2 THE COURT: Should I read it to them or what?

3 MR. WASHOR: We can eliminate any kind of spec-
4 ulation, we can ask them when they come out.

5 (Whereupon the following was held in open court.)

6 THE COURT: Members of the jury we have your
7 note and I infer from that that what you would like is
8 to hear reread the essential elements of count one that
9 is the one that had the four points in it, count two
10 had only three points in it. Are those the two things
11 you wanted, or just -- let me read them to you and if
12 you wish to have copies of them then I can consider that
13 with counsel, give them to you in the morning, but I
14 don't know we can get them copied that fast.

15 The essential elements of count one all of which
16 the government must prove beyond a reasonable doubt or
17 else you must acquit the defendant whose case you are
18 considering on count one are the following:

19 FIRST, that the women's coats in question were
20 moving as or constituted a foreign shipment of freight
21 at the time they were stored in cargo building 67 at
22 John F. Kennedy International Airport;

23 SECOND, that the defendants actively participated
24 in taking the women's coats on October 23, 1975;

25 THIRD, that the women's coats were taken from

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2 cargo building 67 without the consent of their owner
3 or the authorities in charge of cargo building 67; and

4 FOURTH, that the defendants participation in the
5 taking of the women's coats was a conscious and intent-
6 ional participation carried out with the knowledge that
7 he was taking part in stealing for his own use goods
8 belonging to others.

9 If the government proves each of these four
10 essential elements beyond a reasonable doubt, you will
11 find the defendants guilty on count one. If the govern-
12 ment fails to prove any one, or more, or all of the
13 essential elements of count one, then you must acquit
14 the defendants on count one.

15 On count two the conspiracy count, and the ess-
16 ential elements of count two all of which the govern-
17 ment must establish beyond a reasonable doubt or else
18 you must acquit the defendant whose case you are con-
19 sidering are the following:

20 FIRST, that the conspiracy to steal or to have
21 in their possession the women's coats described in the
22 indictment was formed;

23 SECOND, that the defendant whose case you are
24 considering became a member of the conspiracy knowing
25 that the conspiracy was one to steal goods moving or as

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2 constituting part of a foreign shipment of freight, or
3 to receive and possess the stolen goods; and

4 THIRD, that for the purpose of carrying forward
5 the conspiracy, the defendants traveled together by
6 truck from JFK Airport to Staten Island.

7 If the government proves each essential element
8 of count two beyond a reasonable doubt, you will find
9 the defendant whose case you are considering guilty on
10 count two. If the government fails to prove any one
11 or more of the essential elements of count two beyond
12 a reasonable doubt, you must acquit the defendant whose
13 case you are considering on count two.

14 All right, now, let's see if we can make copies
15 of these. Probably not until tomorrow.

16 (Whereupon the marshal was sworn by the clerk
17 of the court.)

18 THE COURT: You will be going in a few min-
19 utes.

20 (Whereupon the following was held outside the
21 hearing of the jury.)

22 MR. LEVIN-EPSTEIN: I didn't realize that
23 when the charge was first given, but I wonder whether
24 or not the Court spoke it inadvertently on the charge
25 on the first element of the conspiracy count when it

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2 said that the crime must be proven in that one of the
3 elements that the government must prove that both of
4 the co-conspirators entered the conspiracy knowing it
5 was a conspiracy to -- I have introduced the Fiola De-
6 cision, it's only --

7 MR. WASHOR: I believe later on in your charge
8 you make the statement that they do not have to have --

9 THE COURT: You mean in view of Crimmins?

10 MR. LEVIN-EPSTEIN: And the Fiola.

11 THE COURT: And the later case. I haven't
12 thought about that. No, it was definitely -- let me
13 see what this means.

14 MR. LEVIN-EPSTEIN: I know that the Court
15 instructs them on the instance of violation that the
16 knowledge requirements to satisfy even though they
17 might not know or may not find out the goods were trav-
18 eling interstate, but merely the theft which is the law
19 I think it's my only fault for not catching it sooner,
20 but I would suggest that a curative be given.

21 THE COURT: Yes, it's wrong the way it stands,
22 you suggest -- well, I see it's -- really the way it
23 should read is that the conspirac, was one to steal
24 goods moving in commerce, not to defendant's become a
25 member knowing that it was, that there was a conspiracy

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to steal afoot.

MR. LEVIN-EPSTEIN: Exactly.

THE COURT: It must be a conspiracy to steal goods in moving, or else we don't get it at all. But any one member doesn't have to know that as long as it's that in fact. Right?

MR. LEVIN-EPSTEIN: I agree.

THE COURT: I have turned it upside down. Going to be a little hard to shift gears on them.

MR. LEVIN-EPSTEIN: Perhaps this is the time to start shifting, the elements of the crime is fresh in their minds.

MR. WASHOR: I know the law and they don't have to prove knowledge in a conspiracy count. That the goods were part of an interstate shipment.

MR. SCHACHER: Don't have to prove that at all. Your Honor, might --

MR. WASHOR: May I suggest that since it's going to be submitted to them tomorrow the Court excise out looking at the second paragraph moving as constituting part of a foreign shipment of freight. And just in the retyping of a conversation of knowing that the conspiracy is one to steal goods or to receive or possess the stolen goods.

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2 MR. LEVIN-EPSTEIN: I would agree to that
3 Your Honor.

4 THE COURT: We have to get the instituting
5 in up above.

6 MR. WASHOR: The Court accept a suggestion
7 from counsel. If you could interpolate making the words
8 moving as or constituting part of a foreign shipment
9 of freight. Remove it from the second element and place
10 it in the first element after the words coats.

11 THE COURT: Wouldn't it be this, see if it
12 works this is substantially what you're saying. That
13 a conspiracy was formed to steal goods moving as or con-
14 stituting part of a foreign shipment of freight or to
15 have the possession of goods so stolen.

16 MR. LEVIN-EPSTEIN: Is that satisfactory to
17 you Mr. Washor?

18 MR. WASHOR: Yes, it is.

19 MR. LEVIN-EPSTEIN: Is that satisfactory to
20 you Mr. Schacher?

21 MR. SCHACHER: I'll agree.

22 THE COURT: I'll have to retype with that
23 modest change in it.

24 MR. LEVIN-EPSTEIN: I asked they be signed
25 verbally of the change, there is a difference as we all